No. 16358.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY H. MEISNER,

Appellant,

vs.

RELIANCE STEEL & ALUMINUM CO., a corporation and SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, Executor of the Estate of Thomas J. Neilan, Deceased,

Appellees.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

Statement Showing Jurisdiction.

Plaintiff's amended complaint alleges that he is a citizen of the State of Michigan, that both the defendants are citizens of the State of California and that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs. [R. 7.] These facts are admitted by the answers of the defendants. [R. 11, 14.]

The action was commenced on June 2, 1958. [R. 119.] Jurisdiction of the district court was founded upon diversity of citizenship and an amount in controversy in excess of then existing jurisdictional minimum under 70 STAT. 658 (1956), 28 U. S. C. 1332.

This appeal by the plaintiff is from the final judgment of the district court. [R. 115.] Timely notice of appeal was filed and the appeal duly perfected. [R. 116.] Jurisdiction of the court of appeals is founded upon 72 STAT. 348 (1958), 28 U. S. C. 1291.

Statement of the Case.

Appellees do not accept appellant's statement of the case (App. Op. Br. pp. 3-6) for the reason that it disregards material facts admitted during the course of the discovery proceedings below. At the close of such discovery proceedings and in compliance with the local rules of the district court relative to pre-trial conference hearings, defendants prepared and submitted to plaintiff a concise statement of material facts. [R. 51-57.] Plaintiff characterized the statement as excellent and accurate in all but minor, defined respects. [R. 97-98.] Accepting plaintiff's version of each of the controverted matters of fact, appellees submit the following statement of the case as a statement of agreed facts:

Plaintiff is a lawyer admitted to practice and practicing law in the State of Michigan. [R. 51.] Defendant Reliance Steel & Aluminum Co. (hereinafter called "Reliance Steel") is a California corporation principally engaged in the business of jobbing fabricated steel and aluminum. [R. 51.] Defendant Security-First National Bank (hereinafter called the "Bank") is a national banking association having its principal place of business in the State of California. [R. 52.] The Bank is sued in its capacity as executor of the will of Thomas J. Neilan (hereinafter called "Neilan"). [R. 52.] In his lifetime, Neilan was the president and one of the directors and indirectly controlled a majority of the shares of Reliance Steel. [R. 52.] The Bank is the duly appointed, qualified and acting executor of Neilan's will in probate proceedings now pending in the Superior Court of the State of California in and for the County of Los Angeles (L. A. Superior Court No. 397,909). [R. 52.]

On about April 4, 1957,[1] plaintiff first learned from an advertisement anonymously appearing in the April 2, 1957, edition of the Wall Street Journal that a West Coast steel jobbing business was for sale. [R. 52.] On about April 8, 1957, plaintiff made letter inquiry responsive to the advertisement expressing interest in purchase of the business. [R. 53.] On about April 12, 1957, the anonymous advertiser replied by letter identifying himself as one Jack Moore (hereinafter called "Moore") and enclosing limited financial data relative to Reliance Steel. [R. 53.] Moore did not disclose the identity of the business, its form of structure, the principals involved or his relationship to the business. [R. 53.] A desultory correspondence between Moore and plaintiff ensued. [R. 53.] Neither party made disclosure of the identity of the entities each represented. [R. 53.]

On about June 15, 1957, Moore advised Neilan of the interest of plaintiff's client in the purchase of the business of Reliance Steel. [R. 53.] Following receipt of Moore's advice, Neilan instructed one of the officers of Reliance Steel, William T. Gimbel (hereinafter called "Gimbel"), to contact plaintiff to determine the identity of the principals that plaintiff represented and to obtain a more precise idea of their interest. [R. 53.] Neilan thereafter advised Moore of his instructions to Gimbel. [R. 53.]

On about July 11, 1957, Moore informed plaintiff by telephone that a representative of Reliance Steel would call for an appointment at plaintiff's offices in Detroit within a week. [R. 41.] On about July 20, 1957, Gimbel visited plaintiff in plaintiff's law offices in Detroit. [R. 98.] Plaintiff refused to divulge his client's identity without first obtaining Reliance Steel's written commit-

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[1]The date in the transcript reference is April 4, 1958; the context makes clear that the year intended is 1957.

ment that he, plaintiff, would be entitled to a broker's commission in the event of consummation of the sale. [R. 107.] Following their discussion, Gimbel returned to California and dispatched his July 30, 1957, letter to plaintiff, confirming their July 20 conversation, disclaiming any interest on the part of Reliance Steel in the hiring of plaintiff and relating that Moore had been given the opportunity to locate an acceptable buyer for the business of Reliance Steel under an informal agreement whereby Moore would receive a fee commensurate with his efforts. [R. 55; Ex. E at R. 87-88.]

On July 21, 1957, plaintiff telephoned Moore to obtain a commission participation commitment. [R. 54.] Moore represented to plaintiff that he had an agreement with Reliance Steel whereby he, Moore, would receive a sales commission of 5% of the first million dollars plus 2½% of the balance of the purchase price for the stock, assets or business of Reliance Steel if and when such a sale were consummated. [R. 54.] In the course of the telephone conversation, plaintiff and Moore reached an agreement whereby Moore promised plaintiff one-half the total sales commission realized by Moore from the sale of the stock, assets or business of Reliance Steel if plaintiff were responsible for the consummation of such sale. [R. 54-55.] That agreement was confirmed by an exchange of letters between Moore and plaintiff. [R. 55; App. Op. Br. p. 4; Ex. C at R. 85; Ex. D at R. 86.]

Believing himself assured of participation in a sales commission by his agreement with Moore, plaintiff wrote Moore a July 20, 1957, letter, copy to Gimbel, disclosing the names of the persons he represented to be prospective purchasers. [R. 55.]

On about August 5, 1958, a representative or associate of Myron Hokin (hereinafter called "Hokin"), one of

the persons proposed by plaintiff as interested in the purchase, arrived in Los Angeles to visit the premises where plaintiff's business was conducted. [R. 55.] On about August 12, 1957, plaintiff and Hokin and several of Hokin's associates came to Los Angeles to open negotiations for the purchase of the business on a cash basis. [R. 55.] The proposal of Reliance Steel made at that time is embodied in its August 15, 1957, letter to Hokin. [Ex. No. 1 at R. 48-50.]

On about August 27, 1957, Hokin and his associates again came to Los Angeles accompanied by a Mr. Haase, a Vice-President of the First National Bank of Chicago, the financing agency in the transaction. [R. 56.] After extended discussion with Reliance Steel, Hokin withdrew from the negotiations because the parties were unable to agree on the purchase price and other material terms of the sale. [R. 56.]

In September, 1957, plaintiff made an effort to revive the deal. [R. 56.] Plaintiff procured from Hokin in Chicago:

a. Hokin's September 30, 1957, letter addressed to Reliance Steel [reproduced as a part of Ex. B at R. 79-82], setting forth an offer to purchase the therein identified assets of the corporation on the terms and subject to the conditions therein set forth;

b. Hokin's September 30, 1957, letter to Paul D. Dodds, a Vice-President of the Bank [Ex. A at R. 78-79], enclosing a copy of the above offer and notifying the Bank of his intention to open an escrow "subject to the parties' entering into a mutually satisfactory contract";

c. A cashier's check drawn in favor of the Bank by The First National Bank of Chicago in the sum of $250,000. [R. 56.]

Plaintiff enplaned for California armed with the check and letters. [R. 57.] He presented the proposal to Reliance Steel in Los Angeles. [R. 57.] Further negotiations with Reliance Steel were pursued in that City by plaintiff. [R. 57.] In an effort to induce Reliance Steel to sell the assets identified in Hokin's September 30, 1957, letter at the reduced price therein provided for, plaintiff stated he would forego one-half of the share of the total sales commission to which he would be entitled under his agreement with Moore, thus reducing the total sales commission payable by Reliance Steel in the event a sale were consummated. [R. 57.] As a result of the negotiations in Los Angeles and the plaintiff's representation relative to his share of the commission, Reliance Steel and Neilan endorsed the Hokin September 30, 1957, letter [Ex. B at R. 79-82] after first preparing and attaching thereto a rider bearing date October 2, 1957. [Ex. B at R. 83-84.] Plaintiff left the Hokin letter to Dodds and the $250,000 cashier's check with Neilan and returned to Chicago to obtain Hokin's approval of the October 2, 1957, rider. [R. 57.] Plaintiff obtained the approval of Hokin in Chicago and dispatched the approved rider to Neilan by mail, together with instructions to present the cashier's check and the Hokin letter to Dodds at the Bank. [R. 57.] Neilan complied. [R. 57.] Plaintiff was not at any time while actively engaged within the State of California in such negotiations licensed either as a business opportunity broker or salesman. [R. 21, par. 59; R. 24, par. 59.]

On about November 12, 1957, Neilan dispatched a letter bearing that date to plaintiff. [R. 38-39, pars. 18, 20; Ex. H at R. 89-90.] Enclosed therewith was a form of letter for plaintiff's execution providing for direct payment of a percentage sales commission to plaintiff by Reliance Steel if and when a formal contract of purchase and

sale were executed and the sale consummated and provided that plaintiff would forego one-half of the commission to which he would be otherwise entitled under his agreement with Moore. [R. 38-39, par. 19; Ex. J at R. 90-91.] Plaintiff did not execute the Neilan November 12 letter enclosure. [R. 59.] Instead, on November 18, 1957, plaintiff wrote Neilan enclosing a letter bearing the same date wherein he offered to accept a flat fee of $30,000 payable directly to him on the close of escrow if and when a formal purchase and sale agreement were executed and the sale consummated. [R. 59; Exs. K and L at R. 91-94.] Neilan died November 17, 1957, prior to the dispatch of plaintiff's letter offer. [R. 59.]

Plaintiff's claim against Neilan's estate was not presented to the Bank, as executor of Neilan's will, until about June 11, 1959, after this action had been commenced. [R. 9, par. 8, plaintiff's amended complaint; R. 15, first defense of the Bank's answer; R. 119, Docket Entries.]

Plaintiff contends that he completed the performance of his alleged agreement and became entitled to a commission when Hokin signed the October 2, 1957, rider to his September 30, 1957, letter. [R. 19, par. 45; R. 23, par. 45.] Plaintiff admits that the September 30, 1957, letter together with the October 2, 1957, rider thereto [Ex. B at R. 79-84] is the only purported agreement to purchase and sale of the business or assets of Reliance Steel upon which he relies in his contention that he is entitled to a commission. [R. 26, par. 8; R. 27, par. 8.]

Summary of Argument.

I. At the time of the hearing on defendants' motion for summary judgment, no genuine issue as to any material fact existed. Accordingly, the action was then in a proper posture for disposition by summary judgment.

II. Plaintiff was not a party to any contract of employment relative to the sale of the assets or the capital stock or the business of Reliance Steel to which Reliance Steel and Neilan, or either of them, were parties.

III. Payment of compensation to plaintiff under his alleged employment agreement was contingent upon consummation of a sale of the assets or the capital stock or the business of Reliance Steel. No sale and no valid and enforceable contract of sale of the assets or the capital stock or the business of Reliance Steel was ever made. A preliminary form of agreement which leaves material or essential terms for future agreement is not a valid and enforceable contract.

IV. Plaintiff was not entitled to any compensation for his services because, while unlicensed and in expectation of compensation, he actively participated within the State of California in the negotiations for the purchase of the assets of Reliance Steel. The California law requires that all persons be licensed who, for compensation or in expectation of compensation, solicit for prospective purchasers or negotiate the purchase and sale of a business or a business opportunity.

V. Plaintiff's action commenced June 2, 1958 against the Bank as executor was premature because no cause of action against Neilan's estate arose until after presentation to the Bank on about June 11, 1958 of plaintiff's creditor's claim. Under the California law, no cause of action arises against the estate of a deceased person unless and until a creditor's claim is first presented to the personal representative of the deceased or is filed with the clerk of the court in which the proceedings relative to the estate of such deceased person are pending.

ARGUMENT.

I.

At the Time of the Hearing on Defendants' Motion for Summary Judgment, No Genuine Issue as to Any Material Fact Existed. Accordingly, the Action Was Then in a Proper Posture for Disposition by Summary Judgment.

By his amended complaint, plaintiff alleged: that he was employed by the defendants to find a purchaser ready, willing and able to purchase the assets of Reliance Steel on terms mutually agreeable to buyer and seller; that he found such a purchaser who entered into a contract of sale with Reliance Steel; and, that pursuant to his employment agreement, plaintiff thereby became entitled to a commission which defendants have refused to pay.

Following the commencement of this action, discovery proceedings were pursued by defendants. Plaintiff responded under oath to the interrogatories and requests for admissions that were served upon him. [R. 18-42.] By his sworn answers and admissions, plaintiff himself controverted the allegations of the amended complaint.

Defendants thereupon moved for summary judgment. The motion was based upon plaintiff's sworn answers and admissions and upon the uncontroverted affidavit of William T. Gimbel. [R. 62.] No effort was at any time undertaken by plaintiff to amend or in any way alter his sworn answers and admissions. At the hearing on the motion for summary judgment, the trial court had before it a record devoid of controversy as to any fact material to an adjudication of the action upon its merits. Accordingly, the trial court ruled upon the issues of law as framed by the pleadings, files and records in the action.

Plaintiff now urges on appeal that the trial court erred in granting the motion for summary judgment because there were triable issues of fact presented. (App. Op. Br. pp. 7-12.) No specification is made of what triable issues of fact were presented to the trial court, as indeed none can be made. The existence of the commission agreement and the legal relations created thereby, if any (App. Op. Br. pp. 10-11), is a matter of law to be determined by the court in the light of the admitted facts. Performance by plaintiff of the commission agreement (App. Op. Br. pp. 11-12) based upon the enforceability of the purported purchase and sale agreement [Ex. B at R. 79-84] must, perforce, rest upon resolution of the legal issue of whether that purported purchase and sale agreement is a binding contract or merely an agreement to agree in futuro. Whether the defendants waived the provision of the commission agreement that payment was contingent upon consummation of a sale (App. Op. Br. p. 12) is wholly immaterial unless the court concludes as a matter of law, first, that the defendants or either of them are parties to the commission agreement [Exs. C and D at R. 85-86] and, second, that the purported purchase and sale agreement of the assets of Reliance Steel [Ex. B at R. 79-84] is an enforceable contract. Finally, the allegations of the amended complaint though concededly well-pleaded (App. Op. Br. pp. 8-9) cannot stand in the face of the plaintiff's own contradictory sworn answers and admissions. (*Suckow Borax Mines Consol. v. Borax Consolidated,*[2] 185 F. 2d

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[2]In the *Suckow* case, responsive to appellant's contention that the affidavits, filed by the moving party in support of a motion for summary judgment, cannot be used to contradict the well-pleaded allegations of a complaint, the court stated (185 F. 2d at 205):

> "But when a general statement in a pleading is shown by specific facts stated in controverting affidavits, depositions and

196, 9 Cir., cert. denied 340 U. S. 943, rehearing denied, 341 U. S. 912; *Koepke v. Fontecchio,* 9 Cir., 177 F. 2d 125, 127; *Lindsey v. Leavy,*[3] 9 Cir., 149 F. 2d 899; *Piantadosi v. Loew's Inc.,* 9 Cir., 137 F. 2d 534.)

II.

Plaintiff Was Not a Party to Any Contract of Employment Relative to the Sale of the Assets or the Capital Stock or the Business of Reliance Steel to Which Reliance Steel and Neilan, or Either of Them, Were Parties.

By his amended complaint, plaintiff alleged that Reliance Steel and Neilan employed him and Jack Moore "by various instruments in writing . . . to find a purchaser ready, willing and able to purchase . . ." the assets or capital stock of Reliance Steel on terms mutually acceptable to buyer and seller. [R. 8, par. 4.] Discovery disclosed that plaintiff was unable to produce or identify any writing evidencing an employment agreement between Neilan and Reliance Steel, or either of them, and himself. [R. 63-64.] Plaintiff now concedes (App. Op. Br. p. 4) that the employment agreement by which he was

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admissions, to be untrue, and the facts so presented are not denied and are not of such nature as to be peculiarly within the knowledge of the affiant, then no 'genuine' issue remains for the trier of the facts."

[3]In the *Lindsey* case, where plaintiff complained on appeal from an adverse summary judgment that there were triable issues of fact raised by his complaint, the court, affirming the judgment, replied (149 F. 2d at 902):

"The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss. For a further discussion of this principle see 3 Moore's Federal Practice, pp. 3174, 3175. The rule is now well established in the many cases dealing with the problem."

first hired was with Moore and is evidenced by Moore's July 21, 1957 letter to plaintiff and plaintiff's July 25, 1957 letter reply. [Exs. C and D at R. 85-86.]

A reading of that employment agreement reveals that plaintiff was hired by Moore on a split commission basis, not to find a purchaser ready, willing and able to purchase the assets or the business of Reliance Steel, but to initiate, negotiate and consummate a sale on terms mutually acceptable to buyer and seller. Plaintiff expressed to Moore his own understanding of the employment as follows [Ex. D at R. 86]:

> "I am in receipt of your letter of July 21st confirming our fee arrangement which is an equal division between us of the total commissions to be received from the Reliance Steel and Aluminum Company of Los Angeles *upon the completion of a deal initiated and concluded by me.*" (Emphasis added.)

In paragraph 5 of the first and second counts of the amended complaint, plaintiff alleged that a subsequent agreement was made between the parties providing that one-half of the commission payable upon consummation of the sale would be paid directly to plaintiff and the other half to Moore. [R. 8, 10.] Plaintiff contends that such subsequent agreement was made by an exchange of letters between Neilan and himself dated, respectively, November 12 and 18, 1947.[4] [R. 64, quoting from R. 18-19 and 22.]

Appellees contend that the Neilan November 12 letter enclosure [Ex. J at R. 90-91] constituted an offer on the part of Neilan to pay plaintiff the percentage commission

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[4]The Neilan November 12, 1957, letter and letter enclosure are set forth as Exhibits H and J, respectively, at R. 89-91. The November 18 letter and letter enclosure from plaintiff to Neilan are set forth as Exhibits K and L, respectively, at R. 91-94.

therein set forth if and when a purchase and sale agreement for the assets of Reliance Steel were executed. Plaintiff has admitted that he did not execute the Neilan November 12 letter enclosure. [R. 69-70, quoting from R. 31 and 39.] Instead, plaintiff prepared and executed the November 18 letter [Ex. K at R. 91-93] and letter enclosure [Ex. L at R. 93-94] and forwarded the same by United States mail to Neilan, the addressee. [R. 70, quoting from R. 31-32 and R. 39-40.] The November 18 letter enclosure by its terms seeks an agreement that the commission payable upon execution of a final purchase and sale agreement for the assets of Reliance Steel shall be the fixed amount of $30,000, not the percentage commission provided for in Neilan's November 12 letter enclosure. [Ex. J at R. 90-91.] The plaintiff's November 18 letter enclosure constituted, as a matter of law, a counter-offer on the part of plaintiff and a rejection of Neilan's offer as embodied in his November 12 letter enclosure. (*American Aeronautics Corp v. Grand Central Aircraft Co.,* 155 Cal. App. 2d 69, 79, 317 P. 2d 694, 701; *Haywood Lumber & Inv. Co. v. Construction Products Corp.,* 117 Cal. App. 2d 221, 227, 255 P. 2d 473, 476-477; *Ajax Holding Co. v. Heinsbergen,*[5] 64 Cal. App. 2d 665, 669-670, 149 P. 2d 189, 192.)

Neilan died November 17, 1957. [R. 28, 36.] There could not, therefore, have been an acceptance by Neilan of plaintiff's November 18 flat fee proposal.

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[5]"To be effective an acceptance must be unequivocal and positive and must comply with the terms of the offer. [Cite omitted.] It must be approved in the terms in which it is made. The addition of any condition or limitation is tantamount to a rejection of the original offer and the making of a counter-offer. [Cite omitted.] A counter-offer containing a condition different from that in the original offer is a new proposal and, if not accepted by the original offeror, amounts to nothing." (64 Cal. App. 2d at 669-670, 149 P. 2d at 192.)

III.

Payment of Compensation to Plaintiff Under His Alleged Employment Agreement Was Contingent Upon Consummation of a Sale of the Assets or the Capital Stock or the Business of Reliance Steel. No Sale and No Valid and Enforceable Contract of Sale of the Assets or the Capital Stock or the Business of Reliance Steel Was Ever Made. A Preliminary Form of Agreement Which Leaves Material or Essential Terms for Future Agreement Is Not a Valid and Enforceable Contract.

Absent an expression to the contrary in his employment agreement, a broker is not entitled to a commission unless a sale is consummated or a valid and enforceable contract of sale made. (*Keeler v. Glendon,*[6] 124 Cal. App. 2d 634, 268 P. 2d 1089.) The employment contract, of course, gives the measure of the broker's right. (*Rutherford v. Berick,* 82 Cal. App. 2d 331, 186 P. 2d 23.)

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[6]"Moreover, our law has always required a broker to bring a sale to a point where there is a valid and enforceable agreement between seller and buyer before he is entitled to a commission.

> 'Before a broker is entitled to compensation, the negotiations which he is authorized to make must be concluded or conducted to the sate where, as to all the material or essential terms of the sale, there is a meeting of the minds or an agreement between the principal and the customer produced by him; but if the principal and customer are unable to come to terms, the broker cannot recover.' [Cites omitted.]
>
> 'Plaintiff was entitled to a commission only if defendant and Neidorf came to a meeting of the minds as to the terms of sale and if the contract did not fail of consummation through the fault of defendant.' [Cites omitted.]

In 9 Cal. Jur. 2, Sec. 80, . 242, it is said:

> 'The duty assumed by him (the broker) is to bring the principal and the customer to an agreement, and until this is done, his right to commissions does not accrue.'" (124 Cal. App. 2d at 637-638, 268 P. 2d at 1091.)

In the instant action, plaintiff concedes that payment of compensation to him under his commission agreement with Moore [Exs. C and D at R. 85-86] was contingent upon consummation of a sale of the assets or the business of Reliance Steel. (App. Op. Br. p. 5.) The plain language of each of the writings which plaintiff contends evidence his employment agreement [Exs. C and D at R. 85-86; Ex. L at R. 93-94] contemplates either consummation of a sale on terms mutually satisfactory to Reliance Steel and the prospective purchaser or the execution of a final purchase and sale agreement.

Under the law and by the express terms of his employment contract, plaintiff was not entitled to compensation by merely finding or introducing a prospective purchaser to Reliance Steel. Plaintiff was entitled to commission compensation only in the event he brought the sale to completion or an enforceable contract of sale were made. (*Connor v. Riggins,*[7] 21 Cal. App. 756, 132 Pac. 849.)

Plaintiff concedes that no sale of the assets or the business of Reliance Steel was made. [R. 9, par. 6 of the amended complaint.] Plaintiff contends that the sale was not made because defendants refused to perform a purported purchase and sale agreement. [Ex. B at R. 79-84.] Plaintiff admits that such purported purchase and sale

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[7]In the *Connor* case, an action for a commission by the assignee of a broker who allegedly rendered services in pursuance of an exchange of realty which was never consummated, the court said (21 Cal. App. at 760, 132 Pac. at 851):

> "Moreover, since the word 'consummate' means to bring to completion, and the court found that the oral agreement was to *consummate* an exchange of both the real and personal property of defendant, and 'that said trade or exchange of the properties between J. W. Riggins and John T. Sweatt has never been consummated,' it would seem clear that plaintiff is not entitled to recover commissions."

agreement is the only agreement upon which he relies in his contention that he is entitled to commission compensation. [R. 26, par. 8; R. 27, par. 8.]

Defendants submit that the purported purchase and sale agreement, comprising the September 30, 1957 letter with the October 2, 1957 rider attached thereto [Ex. B at R. 79-84] constitutes nothing more than an agreement to agree. The provisions of the purported sale agreement were explicitly made nugatory unless and until a formal contract should be executed by the parties. Further, consummation of the sale and lease of the property therein described was expressly conditioned, *inter alia,* upon: (i) obtaining the approval of designated suppliers to Reliance Steel to continue their present consignment and distributorship agreements with the prospective purchaser; and, (ii) the execution by and between such prospective purchaser and the "present key personnel" of Reliance Steel of "mutually satisfactory employment agreements." [R. 81-82.]

The purported sale agreement expressly contemplates further negotiations. The October 2, 1957, rider provides in part that the prospective purchaser shall negotiate the procurement of the agreement and approval of said suppliers to continue their consignment and distributorship agreements. It also provides that the purchaser shall complete his negotiations with "present key personnel" relative to the consummation of mutually satisfactory employment agreements prior to the determination of the price of the assets contemplated to be sold. [R. 82.] In addi-

tion, the rider explicitly calls for a "lease satisfactory to both parties as to form." [R. 84.]

Either party, by the very terms of the undertaking, could refuse to agree to anything to which the other party might agree. Under such conditions, any promise made is unenforceable. The purported sale agreement was not, therefore, a valid and enforceable contract. (1 *Williston on Contracts,* Sec. 45, p. 131 (1936 Ed.); *Autry v. Republic Productions, Inc.,*[8] 30 Cal. 2d 144, 180 P. 2d 888; *Roberts v. Adams,*[9] 164 Cal. App. 2d 312, 330 P. 2d 900; *Ajax Holding Company v. Heinsberger,*[10] 64 Cal. App. 2d 665, 149 P. 2d 189.)

Plaintiff urges that a $250,000 deposit on the purchase price was made in pursuance of the purported purchase and sale agreement. (App. Op. Br. p. 3.) Reference to the letter of instructions [Ex. A at R. 78-79] transmitting the cashier's check in the sum of $250,000 reveals that the

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[8]"There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. (*Klein v. Markarian,* 175 Cal. 37 [165 P. 3]; *Los Angeles Immigration & Land Co-operative Assn. v. Phillips,* 56 Cal. 539; *Dillingham v. Dahlgren,* 52 Cal. App. 322 [198 P. 832] and cases cited.) The court may not imply what the parties will agree upon. (*Kerr Glass Mfg. Corp. v. Elizabeth Arden Sales Corp.,* 61 Cal. App. 2d 55 [141 P. 2d 938].)" (30 Cal. 2d at 151-152, 180 P. 2d at 893.)

[9]"It is hornbook law that an agreement to make an agreement is nugatory, and that this is true of material terms of any contract." (164 Cal. App. 2d at 314, 330 P. 2d at 901.)

[10]"* * * Where a preliminary contract leaves certain terms to be agreed upon as the final contract it may not be inferred upon what the parties will agree. (*Kerr Glass Mfg. Corp. v. Eilzabeth Arden Sales Corp.,* 61 Cal. App. 2d 55 [141 P. 2d 938].)" (64 Cal. App. 2d at 671, 149 P. 2d at 193.)

check was not a deposit on the purchase price at all. The Bank as addressee of that letter was expressly instructed to hold the check pending further directions and pending the parties entering into a mutually satisfactory contract and escrow agreement. No escrow was to be opened according to the letter of instructions and the proposal enclosed therewith [Ex. B at R. 79-84] unless and until a mutually satisfactory contract was executed. By the letter of instructions, Hokin, the prospective purchaser, clearly contemplated further negotiations to the end of consummating a mutually satisfactory formal contract.

Finally, whether a writing constitutes a final agreement or merely an agreement to agree at some future time depends primarily upon the intention of the parties. (*Smissaert v. Chiodo,*[11] 163 Cal. App. 2d 827, 330 P. 2d 98; *Forgeron Inc. v. Hansen,* 149 Cal. App. 2d 352, 360, 308 P. 2d 406, 411; *Kuhn v. Gottfried,*[12] 103 Cal. App. 2d 80,

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[11]"Whether a writing constitutes a final agreement or merely an agreement to make an agreement depends primarily upon the intention of the parties. . . . The intent of the parties is to be determined by an objective standard and not by the unexpressed state of mind of the parties. [Cite omitted.] Where any of the terms are left for future determination or there is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done. [Cite omitted.]" (163 Cal. App. 2d at 830-831, 330 P. 2d at 100-101.)

[12]" 'When it is part of an understanding between the parties that the terms of a contract are to be reduced to writing and signed by them, assent to its terms must be evidenced in the manner agreed upon else it does not become a binding contract.' [Cite omitted.]" (103 Cal. App. 2d at 85, 229 P. 2d at 140.)

229 P. 2d 137; *Store Properties, Inc. v. Neal,*[13] 72 Cal. App. 2d 112, 164 P. 2d 38.)

In the instant action, the intention of the parties is unambiguously manifested in the October 2, 1957 rider to the September 30, 1957 letter offer. [R. 84.] The express terms of the rider provide that the "letter offer of September 30, 1957, and the terms in this rider *shall be of no force and effect* unless formally accepted and approved on or before October ...., 1957, and a formal contract shall be executed by the parties on or before October ...., 1957." (Emphasis added.) Defendants submit that even had the September 30, 1957 letter offer contained all the essential elements of a contract, the parties conditioned its legal efficacy by their execution of the rider on the execution of a formal document which would contain all the incidental terms of their agreement. The manifested intent of the parties, coupled with the uncertainties and the conditions of the September 30, 1957 letter offer itself, are demonstrably incompatible with any contention that an enforceable contract of sale was made.

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[13]"When it is the understanding that the terms of a contract are to be reduced to writing and signed by the parties, assent to its terms must be evidenced by a writing subscribed by all of them; otherwise it does not become a completed contract. [Cite omitted.] When only the principal provisions of a lease are agreed upon, leaving the details and conditions to be expressed in a writing to be executed by the parties, and such writing is never signed by those to be charged, it never becomes a binding obligation upon either. [Cite omitted.] If parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. (1 Williston on Contracts, 59.) If a writing is viewed as the consummation of the negotiations there is no contract until the written draft is finally signed. [Cite omitted.] To be finally settled an agreement must comprise all the material terms and conditions which the parties intend to introduce. In their absence there is no completed contract. [Cites omitted.]" (72 Cal. App. 2d at 116-117, 164 P. 2d at 40.)

IV.

Plaintiff Was Not Entitled to Any Compensation for His Services Because, While Unlicensed and in Expectation of Compensation, He Actively Participated Within the State of California in the Negotiations for the Purchase of the Assets of Reliance Steel. The California Law Requires That All Persons Be Licensed Who, for Compensation, or in Expectation of Compensation Solicit for Prospective Purchasers or Negotiate the Purchase and Sale of a Business or a Business Opportunity.

Plaintiff actively participated in the negotiation of the purchase and sale of the assets of Reliance Steel. [R. 57, 94-97.] He was admittedly present in the State of California on several occasions for that purpose. [R. 20, pars. 46 and 47; R. 23, pars. 46 and 47.] Indeed, following the withdrawal of Hokin and his associates from the August, 1957 negotiations, plaintiff alone revived the deal by soliciting the September 30, 1957 letter offer of Hokin. [R. 56.] Plaintiff then enplaned for California to present Hokin's modified proposal to Reliance Steel. [R. 57.] Neilan and plaintiff negotiated the October 2, 1957 rider which plaintiff took to Chicago personally to present to Hokin for his approval. [R. 57.]

Plaintiff participated not only in effecting introductions of prospective purchasers to Neilan and Reliance Steel. He also participated in the negotiations themselves, as he was obligated to do under the terms of his commission agreement with Moore. [Exs. C and D at R. 85-86.] But for plaintiff's active participation in such negotiations, the purported purchase and sale agreement, comprising the September 30, 1957 letter with the October 2, 1957

rider attached thereto [Ex. B at R. 79-84], would never have been executed. [R. 57.]

The California law requires that all persons who actively solicit or participate in the negotiations for the purchase and sale of a business or business opportunity within the State of California be licensed.[14] Failure to be so licensed precludes the person soliciting or negotiating such purchase and sale from any compensation for his services.[15] Indeed, payment to plaintiff of any compensation for his services would, perforce, expose defendants to the criminal sanctions of the California law.[16] Plaintiff admits he was not licensed as a business opportunity broker or salesman[17]

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[14]Section 10250, Business & Professions Code of the State of California (hereinafter cited as "Bus. & Profs. Code"): "It is unlawful for any person to engage in the business, act in the capacity of, or assume to act as a business opportunity broker or a business opportunity salesman within this State without first obtaining a license from the division. . . ."

Section 10251, Bus. & Profs. Code: 'As used in this part, the words 'business opportunity' shall mean and include business, business opportunity and good will of an existing business or any one or combination thereof."

[15]Section 10257, Bus. & Profs. Code: "No person engaged in the business or acting in the capacity of a business opportunity broker or a business opportunity salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed business opportunity broker or business opportunity salesman at the time the alleged cause of action arose."

[16]Section 10259, Bus. & Profs. Code: "It is a misdemeanor, punishable by a fine of not exceeding fifty dollars ($50) for each offense, for any person, whether obligor, escrow holder or otherwise, to pay or deliver to anyone a compensation for performing any of the acts within the scope of this chapter, who is not known to be or who does not present evidence to such payor that he is a regularly licensed business opportunity broker at the time such compensation is earned. . . ."

[17]Section 10252, Bus. & Profs. Code: "A business opportunity broker within the meaning of this part is a person who, for a compensation, sells or offers for sale, rents, or offers to rent, or col-

at any time while participating within the State of California in the negotiations for the sale of the assets of Reliance Steel. [R. 21, par. 59; R. 24, par. 59.] His activities performed within the State of California were therefore unlawful and non-compensable. (*Pawlak v. Cox,* 148 Cal. App. 2d 294, 306 P. 2d 619, 622.[18])

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lects rent, buys, or offers to buy, lists, leases or offers to lease, or solicits for prospective tenants or purchasers, or negotiates loans on, or negotiates the purchase or sale or the renting, leasing or exchanging of a business, business opportunity, or interest therein, or the good will of an existing business for another or others."

Section 10253, Bus. & Profs. Code: "A business opportunity salesman within the meaning of this part is a natural person who for a compensation is employed by a licensed business opportunity broker to sell or offer for sale, to rent, or offer to rent, or collect rent, or to list or offer to list, or to buy or to offer to buy, or to lease or offer to lease, or to solicit for prospective tenants or purchasers, or to negotiate loans on, or to negotiate the purchase or sale or the renting, leasing, or exchanging of a business, business opportunity, or interest therein, or the good will of an existing business."

[18]A parallel situation was presented to the court in *Owen v. Off,* 36 Cal. 2d 751, 227 P. 2d 457. That case arose under the provisions of the Corporate Securities Act of 1917 as amended (now Sec. 25700 of the Corporations Code of the State of California, a section applicable to securities brokers which is substantially the same as Sec. 10250 of the Business & Professions Code applicable to business opportunity brokers). There the plaintiff contended that, because he was not a broker regularly engaged in the business of selling securities, but was merely hired in an isolated transaction to sell or negotiate for the sale of certain securities, he was not required to procure a license. The court disagreed. In the instant action, the argument that an isolated transaction by one acting as a broker will not prevent recovery of the commission is precluded by a specific statutory provision of the Business & Professions Code: "One act, for a compensation of buying or selling a business opportunity of or for another, or offering for another to buy or sell or exchange a business opportunity, or negotiating the purchase or sale or exchange of, or listing or soliciting prospective purchasers of business opportunities, or negotiating a loan on or leasing or renting or placing for rent a business opportunity, or collecting rent therefrom constitutes the person making such offer, sale or purchase, exchange or lease, or negotiating the loan, or so renting or placing for rent or collecting the rent or listing or soliciting, a business opportunity broker or salesman within the meaning of this part." (Bus. & Profs. Code, Sec. 10255.)

V.

Plaintiff's Action Commenced June 2, 1958, Against the Bank as Executor Was Premature Because No Cause of Action Against Neilan's Estate Arose Until After Presentation to the Bank on About June 11, 1958, of Plaintiff's Creditor's Claim. Under the California Law, No Cause of Action Arises Against the Estate of a Deceased Person Unless and Until a Creditor's Claim Is First Presented to the Personal Representative of the Deceased or Is Filed With the Clerk of the Court in Which the Proceedings Relative to the Estate of Such Deceased Person Are Pending.

Under the California law, subject to exceptions not pertinent here, no action may be maintained against an estate unless a creditor's claim is first filed with the clerk of the probate court in which the proceedings relative to the decedent's estate are pending or is presented to the personal representative of the decedent. (Prob. Code, Sec. 716;[19] *Walton v. Kern,* 39 Cal. App. 2d 32, 102 P. 2d 531.)

This action was commenced on June 2, 1958. [R. 119.] Not until June 11, 1958 did plaintiff present a creditor's claim based upon the facts alleged in his complaint to the Bank as executor. [R. 9, par. 8.] Plaintiff's action was, therefore, prematurely commenced.

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[19]"No holder of a claim against an estate shall maintain an action thereon, unless the claim is first filed with the clerk or presented to the executor or administrator, except in the following case: An action may be brought by the holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless the claim was filed or presented as aforesaid." (Prob. Code, Sec. 716.)

Conclusion.

Appellees submit that the appeal is without merit. No genuine issue as to any material fact exists. There was no contract between Reliance Steel and Neilan, or either of them, on the one hand, and plaintiff, on the other. No valid and enforceable contract of purchase and sale covering the assets of Reliance Steel was ever made. Plaintiff actively negotiated for the sale of the assets of Reliance Steel within the State of California while unlicensed. No actionable claim existed against the Bank as executor prior to the commencement of this action.

It is, therefore, respectfully submitted that the judgment of the district court dismissing the action should be affirmed.

June 19, 1959.

Lawler, Felix & Hall,
William T. Coffin,
Robert Henigson,
Attorneys for Appellees, Reliance Steel & Aluminum Co. and Security-First National Bank, as Executor of the Will of Thomas J. Neilan, Deceased.